Supreme Court, U.S.
FILED
JAN 11 1999
CLERK

No. 98-947

In The
Supreme Court of The United States
October Term 1998

AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC.,
Petitioners,

v.

CORYELL TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated,
Respondents.

Petition For A Writ Of Certiorari
To The Washington Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 332(c)(3)(A), which prohibits regulation by the States of "the entry of or the rates charged" by cellular telephone service providers, preempts state law claims for injunctive relief and damages based on deceptive business practices, when Congress specifically provided that § 332 "shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

2. Whether, in light of the language of 47 U.S.C. § 414 which preserves all "remedies now existing at common law," 47 U.S.C. § 332(a)(3)(A) gives AT&T immunity to deceive consumers and abrogate its contractual promises in violation of state laws.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. Rule 29.6, respondents hereby state that they are individuals and thus have no corporate parents or subsidiaries.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions identified by petitioner, another statutory provision involved is 47 U.S.C. § 414. This provision states, in pertinent part:

> Nothing in this chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

STATEMENT OF THE CASE

A. AT&T's Failure to Disclose

AT&T is the nation's leading seller of cellular telephone services. Respondents alleged that AT&T engaged in a deceptive, fraudulent and/or misleading practice that generates millions of dollars of "airtime" charges for airtime that consumers never receive. Pet. App. 2a-5a.

AT&T offers consumers a range of billing plans for its cellular phone services. These plans offer various fixed charges per month for a specified period of time, e.g. 30, 60 and 90 minutes. Pet. App. 4a. AT&T's advertisements likewise often represent that subscribers will receive certain guaranteed blocks of airtime for their monthly fee. For any airtime beyond the fixed-charge time allotted under each plan, the subscriber is charged at various rates "per minute," depending on the plan and whether the call is made during peak or off-peak hours. Airtime charges for time beyond that allocated in a customer's plan are substantially higher than airtime charges within a plan.

AT&T's contracts and advertisements also purport to describe how AT&T calculates such airtime. According to many of AT&T's customer service agreements, that it requires every subscriber to sign, AT&T charges from the first second of any call to the end of the call. This is

prominently described in the literature as "SEND TO END" billing. Pet. App. 3a.

In reality this is not how AT&T bills. Rather, while billing increments start when the send call button is pressed, billing ends not when the end button is pushed, but at the next full minute after the end button. So for example, a call lasting one minute and six seconds as measured from Send to End is billed as a full two minutes. Pet. App. 3a. This practice is called "rounding."[1]

AT&T's advertising disclosures and service agreements do not inform customers that AT&T secretly bills them for additional time *after* "the time [they] press end."[2] Similarly, no mention of rounding is made in the Customer Service agreement. As a result, customers who purchase plans allowing specified minutes of airtime per month certainly do not expect, and are not told, that AT&T will short them of their allotted time by virtue of the practice of rounding. When a customer exceeds the fixed time on the

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[1] AT&T claims that rounding is a long-standing industry practice. It may be that certain carriers rounded, but generally such rounding did not count toward the fixed time a consumer received under a rate plan, beyond which higher charges would be imposed.

[2] Although AT&T claims this is a standard practice, it cites no support in the record for this proposition. Indeed, one prominent television campaign, run by Nextel, features the fact that Nextel does not round up, but charges for the actual time used.

plan, he or she is then billed at an even higher rate for airtime. Thus, AT&T's practice deprives customers of the airtime they have purchased under a given plan. In the end, AT&T charges consumers tens of millions of dollars that neither its advertising nor its contracts disclose. Pet. App. 4a.

B. Proceedings Below

In light of the above, respondents filed a class action complaint seeking injunctive and monetary relief arising from AT&T's deceptive and unlawful conduct. Consistent with 332(c)(3)(A) 1994, the complaint attacked solely the "terms and conditions of" the services, and invoked, consistent with 47 U.S.C. § 414, the traditional state common law remedies based on deceptive conduct and breach of promise. At no time did respondents seek to change, diminish, or modify the rates being charged by AT&T. Respondents did not seek any relief that would disturb the uniformity of rates charged by AT&T. Rather, respondents sought to enforce the terms of AT&T's promises, that they would charge consumers from "Send to End" and would deliver the amount of airtime promised in the consumers' service plan.

AT&T moved to dismiss the complaint on the grounds that a lawsuit alleging that AT&T engaged in deceptive acts and practices in violation of state law, was preempted by (i) 47 U.S.C. § 332 (c)(3)(A) (the Federal Communications Act) and (ii) the doctrine of primary jurisdiction. During the

pendency of the briefing of AT&T's dismissal motion, the Washington Court of Appeals (Division I) issued its ruling in a somewhat related case, *Hardy v. Claircom Communications Group, Inc. (d/b/a AT&T Wireless Services)*, 937 P.2d 1128 (Wash. Ct. App. 1997). According to AT&T, *Hardy* is a Court of Appeal panel's determination that the FCA preempts all state law claims challenging AT&T's deceptive and unlawful conduct. Erroneously believing it was bound by *Hardy*, the superior court dismissed plaintiffs' claims.

Respondents immediately appealed to the Washington Supreme Court. Not surprisingly, the Washington Supreme Court reversed the superior court finding, and held that respondents' traditional state law claims of misrepresentation, fraud and consumer protection violation were not preempted by Section 332. Pet. App. 31a-32a. The Washington Supreme Court's reasoning was sound. To begin, the Washington Supreme Court found that the *Hardy* ruling, on which the superior court relied, was unpersuasive. *Hardy* involved the filed rate doctrine. This doctrine "is a court created rule to bar suits against regulated utilities involving allegations *concerning the reasonableness of the filed rates*." Pet. App. 8a-9a (emphasis supplied).[3] As the court correctly noted, and as AT&T conceded, AT&T "is specifically

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[3] In support of this statement the court cited *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2nd Cir. 1994). During the proceedings below AT&T conceded that no filed rates were at issue. Pet. App. 13a.

exempted from tariff filing requirements . . . [as a result] those cases are not materially significant." *Tenore v. AT&T Wireless Servs.*, 962 P.2d 104 (Wash. 1998); Pet. App. 31a. Furthermore, the Washington court found that the express language of Section 332 makes clear that not all claims are preempted. This is because the last clause of Section 332 states that "this paragraph shall not prohibit a State from regulating the *other terms and conditions of commercial mobile services*." 47 U.S.C. § 332 (c)(3)(A) (emphasis supplied). The court found that this "terms and conditions" clause limits the preemptive reach of Section 332.[4] Additionally, the court found that the savings clause is indicative of Congressional intent "to preserve state law claims for billing or advertising which do not attack market entry or rates charged" by providers such as AT&T. Pet, App, 31a. Finally, the Supreme Court decision in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), makes clear that a court may award damages without regulating rates. This is especially true where, as here, there is no requirement that a

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[4] *See* H.R. Rep. No. 103-111, 103rd Congress 1st Sess. 211 *reprinted in* 1993 U.S.C.A.A.N. 378, 588 (The phrase "terms and conditions" includes "customer billing information and practices and billing disputes and other consumer protection matters."). Through the "terms and conditions" language, the FCC has specifically noted that the FCA "preserves the rights of parties to pursue legal remedies against interstate carriers that they may pursue against other corporations such as liability for . . . misleading advertising. . . ." *In Matter of Richman Bros. Records Inc. v. U.S. Sprint Comms. Co.*, Release No. DA 95-2438, 10 FCC Rcd 13639, 13641-42, 1995 FCC Lexis 7985, at *16-17 (Dec. 13, 1995)(decided against consumer on other grounds).

tariff be filed, and any impact on rates is "merely incidental." *Id.*[5]

Hence, the court ruled against preemption because plaintiffs, through this lawsuit, are not attempting to alter the rates AT&T chooses to charge. All respondents seek is for AT&T to be held to the terms of its promise to bill "Send to End," as opposed to deceptively informing customers that they would be billed "Send to End" and then billing them "Send" to the next highest minute after which "End" is pressed. As AT&T concedes, it was not until after this lawsuit was filed that AT&T began selectively informing customers that it has been lying about the manner in which it charges for airtime. Pet. 8, n.7. In light of this concession, it is clear that AT&T is asking this Court to do something the Washington Supreme Court refused — turn a blind eye to its *admittedly* deceptive practice under the guise of federal preemption.

REASON FOR DENYING THE PETITION

Review of the Washington Supreme Court decision is neither "urgent" or warranted as AT&T suggests. Congress

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[5] Additionally, the court found that a "challenge to a practice that is not governed by a tariff filing does not implicate the 'conflict' inherent in contesting a practice or rate expressly regulated by an agency. . . ." Pet. App. 31a.

made a clear statement in Section 332 that it was not prohibiting states from regulating terms and conditions of cellular services and further provided that § 332 would not "abridge existing remedies." Requiring truthful advertising is not rate regulation. Requiring AT&T to bill customers as promised and awarding damages when AT&T has not done so is not "rate regulation." Indeed, the Washington Supreme Court decision simply requires AT&T to charge the rate it promised. Rather than giving "carte blanche" to regulate rates, the decision simply requires AT&T to conduct its business truthfully, a requirement imposed on all of corporate America. There is nothing novel or urgent arising from the imposition of honesty.

To further bolster its claim for review, AT&T warns that plaintiffs are asking courts to "regulate rates" for the entire wireless industry. Pet. at 9. As noted, however, this and similar lawsuits simply seek to enforce laws that require all businesses to tell the truth about billing and/or keep contractual promises. One carrier, U.S. West, has settled such claims and paid a rebate to its customers. Res. App. C-19. Such a settlement did not implicate U.S. West's rates or unravel the cellular industry as AT&T suggests will be the result. Thus, contrary to the central theme of AT&T's petition, the cellular industry and its ability to set rates is not being jeopardized by this type of litigation.

Finally, as explained below, there is no conflict among courts of appeals or high state courts that is ripe for review by this Court.

I.

THERE IS NO CONFLICT AMONG THE HIGHEST COURTS OF THE STATES OR BETWEEN A HIGH STATE COURT AND A COURT OF APPEALS THAT WARRANTS REVIEW

AT&T's claim of a conflict among the courts is a manufactured one pursued in a vain attempt to obtain review. There is no split in authority among the circuit courts of appeal or among the highest courts of the states. There is no confusion and controversy among courts — the decisions are uniform.

First, it is important to recognize the distinction between this case and the cases upon which AT&T relies. Cases which arise under the "filed tariff" doctrine, where a company is required to file a tariff by the FCC, uniformly find that state law damage claims are preempted. *See e.g., Marcus v. AT&T Corp.*, 938 F. Supp. 1158 (S.D.N.Y. 1996), *aff'd*, 138 F.3d 46 (2nd Cir. 1998). Cases which address traditional

state law claims such as deceptive advertising or failure to disclose, uniformly rule against preemption. *Kellerman v. MCI Telecomms. Corp.*, 493 N.E.2d 1045 (Ill.), *cert. denied,* 479 U.S. 949 (1986). This case did *not* involve the "filed tariff" doctrine *nor* the services offered by AT&T, but rather arises from issues of deceptive advertising and a failure to disclose and a breach of contract. Hence, the conflict and confusion claimed by AT&T simply does not exist.

The Washington Supreme Court found that the majority of cases relied on by AT&T were predicated upon the "filed rate" doctrine. However, as the court found, this doctrine is wholly inapplicable here — AT&T conceded that it had no tariff on file with the FCC because it is exempt from the filing requirement. Pet. 16; Pet. App. 12a -13a. Hence, the purposes behind the "filed rate" doctrine and the authorities discussing it "are thus not applicable." Pet. App. 13a. As a result, AT&T is off-base in its assertion that "state and federal decisions involving Section 332 preemption are all over the map." Pet. 15.

A. There is No Conflict Among the State High Courts that Deception Claims Are Not Preempted

State courts, and for that matter lower federal courts, are uniform in holding that claims relating to advertising and failures to disclose are not preempted. *See, e.g., Sanderson,*

Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947, 955 (D. Del. 1997); *Kellerman v. MCI Telecomms. Corp.*, 493 N.E.2d 1045, 1051-52 (Ill.), *cert. denied*, 479 U.S. 949 (1986); *Bennett v. Alltel Mobile Comm. Of Alabama, Inc.*, Civil Action No. 96-D-232-N, slip op. at 9 (M.D. Ala. May 14, 1996) (Res. App. A-1), *adopted in full by Moulton v. Alltel Mobile Comm. of Alabama, Inc.*, CA No. 96-D-89-N, slip op. (M.D. Ala. Aug. 16, 1996) (Res. App. B-18); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633-34 (6th Cir. 1987); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 550 (D.N.J. 1996).

Kellerman illustrates that holdings from the highest state courts are in accord with the Washington Supreme Court. In *Kellerman*, MCI, much like AT&T here, contended that plaintiffs were not *really* challenging deceptive advertising but rather were seeking to regulate rates. *Kellerman*, 493 N.E.2d at 1051. Like the Washington Supreme Court, however, the Illinois Supreme Court rejected the argument. As the court noted, "[t]he subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates." *Id.* Hence, just like the Washington Supreme Court, the Illinois Supreme Court found that the issue was deceptive advertising and not "rate regulation":

> [P]laintiffs seek to hold defendant to the same standards as they would any other business

> which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies. . . . The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers . . . . Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions.

Id. at 1051-52. No amount of sophistry can change the fact that the case law does not support defendants conflict argument. *Kellerman*, and the other cases cited above, are in accord with the Washington Supreme Court opinion.

B. AT&T's Review of Intermediate Court Decisions Do Not Present a Conflict of Sufficient Magnitude to Warrant Review

In light of consistent state and federal authority, AT&T was forced to rely on one or two page slip opinions to illustrate its alleged "conflict." However, these cases, with little to no analysis, are not high court or circuit court of appeals opinions and do not support the assertions made throughout AT&T's brief. No amount of verbal acrobatics can change that fact.

Typical is AT&T's citation to *Simons v. GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996), Pet.

15. *Simons* had nothing to do with fraud or deception because such a claim was not asserted. Rather, the plaintiffs claimed that one of GTE's service charges, a termination fee, though plainly disclosed in GTE's service contract, was itself illegal. Pet. 58a-59a. Hence, the *Simons* plaintiff's claim attacked the legality of a rate, and the Court found that such claims are preempted by the FCA. Unlike *Simons*, this case concerns deceptive advertising, and not "rate regulation."

AT&T's reliance on *Ball v. GTE Mobilnet of California, Ltd.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento Cty.) Nov. 17, 1998), is similarly flawed. Pet. App. 63a-64a. The court in *Ball* analogized the case before it to that of *In re Comcast Cellular Telecomms. Litig.*, 949 F. Supp. 1193, 1205-06 (E.D. Pa. 1996). Plaintiffs in both cases "attacked the fairness of charges for non communication time." Not surprisingly, "[t]he court considered this to be more than just a challenge to billing practices (not necessarily preempted) and noted that plaintiffs were attacking the 'reasonableness of the method by which Comcast calculates length and consequently the cost of a . . . call.'" Pet. App. 64a. Hence, "'plaintiff' [sic] claims present a direct challenge to the calculation of rates . . . ." *Id.* Here, unlike *Ball*, there is no challenge to the calculation of the rate but rather, to the failure to disclose the calculation and to the failure to live up to AT&T's promises as set forth in advertising and by the terms of its contract.

AT&T's citations to the trial court decision in *Rogers v. Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) (Pet. App. 65a-66a) and *Powers v. AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (Pet. App. 68a-69a) are equally misplaced. Indeed, *Rogers*, is little more than a minute order which identifies nothing about the grounds for its rulings. In *Powers*, after examining plaintiff's allegations, the court merely concluded that the complaint did "not focus on defendant's alleged failure to disclose . . . but on the legality or reasonableness of such charges." Pet. App. 69a.

Finally, AT&T cites to *Carroll v. Cellco Partnership*, Docket Nos. AM-001316-96T3 and AM-001303-96T3 (N.J. Super. Ct., App. Div., June 25, 1997) (Pet. App. 70a-71a) to support its "confusion" argument. However, *Carroll* is in accord with the plethora of cases cited above. Indeed, the *Carroll* court stated it was "satisfied that plaintiffs' action is primarily grounded on allegations of fraud and consumer protection and not rate setting." Pet. App. 70a-71a. It then ruled that "rates will not be directly impacted" because the respective trial judges would "recognize the limits of jurisdiction as reserved to the States under the 'savings clause' . . . ." *Id.* In other words, the court ruled that the claims were preserved to the extent they assert state-law deceptive-advertising and contract claims – a finding completely in accord with the cases cited above. Hence, as

the Court can see, AT&T's cries of conflict are illusory at best.[6]

Finally, determined to manufacture confusion, AT&T also asserts that regulatory agencies are in disagreement as to the scope of Section 332. In support, it cites to *Nova Cellular West, Inc. v. Air Touch Cellular of San Diego*, Case No. 98-02-036 (CPUC Sept. 3, 1998)(Pet. App. 72a-80a). However, *Nova* did not involve a violation of state consumer protection laws but rather whether AirTouch was required to provide Nova with promotional access and airtime plans available to them at lower rates. Pet. App. 73a. As the Commission noted, "[i]n this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates." *Id.* at 78a. Hence, *Nova* is a case about the lawfulness of rates. The Commission was never confronted with, and

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[6] AT&T attempts to point the finger at the "filed tariff" doctrine for the source of "the confusion among the lower courts." Pet. 16. However, the "filed tariff" rule is clear: it "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory agency." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). Unlike preemption analysis, the filed tariff doctrine does not determine which law governs the plaintiffs claim for fraud against telephone service providers. Rather, as AT&T acknowledges, it can *prohibit altogether* defrauded consumers from bringing any such claims anywhere when the provider has been required to file its rates with a regulating agency. This is because "[e]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956, *3 (1998).

therefore never addressed, the issue of state consumer protection laws, such as those forbidding deceptive advertising. In light of this, the finding in *Nova* is not adverse to that in *Westside Cellular, Inc. v. GTE Mobilnet, Inc.*, 1995 Ohio PUC LEXIS 240 (Mar. 23, 1995). Pet. 17. Indeed, as *Westside* points out, "the legislature intended for the states to retain significant authority over cellular telephone to ensure a competitive marketplace and to safeguard the public interest." *Id.* at *9.

C. If a Conflict Exists it is at Such a Nascent Stage that Review is Premature

Supreme Court Rule 10 sets forth that review on writ of certiorari "is not a matter of right, but of judicial discretion." As stated in the rule, a petition will only be granted for "compelling reasons." *Id.* While not an exhaustive list, Rule 10 does set forth three reasons it deems compelling. One such reason is that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Rule 10(b). It would appear that it is this compelling reason on which AT&T bases its request for review.[7] Yet, AT&T itself concedes that it is

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[7] Rule 10(b) appears to be implicated for AT&T states that "[t]he Washington Supreme Court's decision starkly illustrates the confusion in state and federal courts. . . ." Pet. 18. In addition, to Rule 10(b) it appears AT&T also seeks review pursuant to Rule 10(c) which sets for that review is appropriate where "a state court

"the *lower courts* and federal and state regulatory agencies that are divided," Pet. 18 (emphasis supplied), and not state courts of last resort as set forth in the rule. In light of AT&T's concession, its petition presents no "compelling reason" for Supreme Court review.

It would simply be premature for the Supreme Court to rule in this area when, as AT&T itself admits, it is only *lower* courts that are grappling with the issue. There are few if any circuit court rulings on these issues and only two high state court decisions, one of which forms the basis of this appeal and the other of which is completely in accord. Moreover, time may further illuminate how other high state courts and/or circuit courts will address the issue. *See generally, Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). Hence, this case does not present the type of "compelling reason" contemplated by Supreme Court Rule 10 and the holdings of the Supreme Court.

. . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). However, this compelling reason, like the one discussed above, is also not substantiated by case law. *See* discussion Section II, *infra*.

II.

THE WASHINGTON SUPREME COURT OPINION IS HARMONIOUS WITH PRIOR OPINIONS OF THIS COURT, AND OTHERS, THAT AN AWARD OF DAMAGES DOES NOT EQUAL IMPERMISSIBLE RATE REGULATION[8]

A. The Washington Supreme Court Decision Is Harmonious With Supreme Court Precedent

As a further basis for review, AT&T claims that the decision below conflicts with this Court's holdings. Analysis demonstrates that this is incorrect.

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[8] In as much as AT&T challenges the assessment of damages as opposed to the viability of the claim – its request for certification is premature. Defendants contention is that refunding damages equals retroactive rate regulation. Pet. 22. In *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), the Court was faced with a petition for review on the issue of whether a state statute regarding punitive damages governed the potential recovery on federal claims. The Court denied review determining that it had no authority to hear the appeal. Among the reasons set forth was that the outcome of the further proceedings on remand may render the question moot. Indeed, if the state law claims were ultimately lost on the merits, the issue of damages would be rendered moot. If not, the issues of damages would be addressed at that time. In light of those facts, the Court determined that the Alabama Supreme Court decision was not a "final" judgment worthy of certification. *Jefferson* is strikingly similar to the case before this Court. AT&T's contention that refund damages are retroactive rate setting need not be addressed at this time and could be rendered moot should respondents lose on other issues on remand. In light of this fact, and the holding in *Jefferson*, it is not at all clear that this case is even a final judgment worthy of review.

The Washington Supreme Court found that a request for money damages does not require a court to retroactively establish new rates. Pet. App. 31a. This finding was based in large part on the fact that respondents do not contend that they were injured by AT&T's act of charging for a full minute when the party merely spoke for seconds. Rather, respondents claim damage from AT&T's failure to disclose the practice and its breach of promise to bill "SEND TO END," and *not* from the practice itself. As the Washington Supreme Court so eloquently stated, this case does not challenge rates and an award of damages based on rates does not equal state regulation of rates:

> There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has observed, does not require a court to "substitute its judgement for the agency's on the reasonableness of a rate." Any court is competent to determine an award of damages. [Pet. App. 25a-26a].

Despite this supported finding, AT&T claims that the Washington Supreme Court decision conflicts with the

findings of this Court in *AT&T Co. v. Central Office Tel. Inc.*, 118 S.Ct. 1956 (1998). Pet. 20-21. AT&T is wrong. In *Central Office* the Court held that "the century-old 'filed-rate doctrine' associated with the ICA tariff provisions applies to the Communications Act as well." *Id.* at *15. In *Central Office*, unlike the present situation, the carrier was required to file its rates and tariffs with the FCC. *Id.* Indeed, the Communication Act requires that the "filed tariff [must] show not only the 'charges' but also 'the classifications, practices and regulations affecting such charges,' 47 U.S.C. § 203(a) . . . ." *Id.* at *18. Under the "filed tariff" doctrine, the Court found that the "Communications Act's filed-tariff requirements pre-empt respondent's state law claims." *Id.* at *3. However, as stated throughout this opposition, filed tariff cases are wholly distinguishable. Moreover, here, unlike in *Central Office*, there is no challenge to the practice of billing increments as a practice, only to the failure to disclose those increments.[9] Because *Central Office* never discusses Section 332 or its explicit allowance of state law claims, it is wholly inapposite.

The *lack of conflict with Supreme Court* authority is

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[9] In *Central Office*, the state law claims before the Court were breach of contract and tortious interference with contractual relations. *Ia.* at *11. As the concurring opinion noted, "Respondent contends that petitioner promised to provide it with services on terms different from those listed in the tariff. As the above cases make clear, the filed rate doctrine bars such a claim." *Id.* at *28 (Rehnquist, C.J., concurring).

evidenced by *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). The Court in *Nader* allowed state law claims to proceed because, like here, the court was "not called upon to substitute its judgment for the agency's on the reasonableness of a rate." Pet. App. 24a-25a.[10] In the end, this Court in *Nader* determined that "the action 'does not turn on a determination of the reasonableness of a challenged practice,' but only on the issue of disclosure of that practice, 'the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts.'" App. Pet. 25a.[11] Not only does AT&T fail to distinguish the harmonious ruling in *Nader* in the analytical portion of its petition – it does not even mention it at all. The

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[10] In *Nader*, an airline passenger was denied his reserved and confirmed seat on an airplane because the airline had overbooked the flight. Rather than accept the "denied boarding compensation" the passenger brought a common law action for fraudulent misrepresentation based on the airline's failure to disclose its boarding practices. Pet. App. 23a. Like the respondents here, the passengers were not challenging the practice only the airlines failure to disclose said practice. *Id.* The district court found for plaintiffs but the United States court of appeals reversed holding that the Civil Aeronautics Board was the body charged with determining the reasonableness of the booking practices. *Id.* The Supreme Court reversed. Pet. App. 24a. While focusing mainly on primary jurisdiction grounds, the Court did note that, unlike the case relied on by the Court of Appeals, here "there was no tariff provision requirement that airlines engage in or disclose the practice of overbooking." Pet. App. 25a. Hence, any impact on rates, "would be merely incidental." *Id.*

[11] As the Washington Supreme Court noted, "AT&T [did] not dispute that billing and advertising practices are *not governed exclusively* by the FCA, if at all." Pet. App. 25a (emphasis supplied).

omission is clearly purposeful. *Nader* specifically held that "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." *Id.* 300. The Washington Supreme Court opinion is consistent with *Nader*.

Similar authorities abound whose holdings are in unison with Supreme Court authority and the Washington Supreme Court decision. In *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 550 (D.N.J. 1996), for example, the court found that plaintiffs' claims for nondisclosure of rounding did not require a court to assess the reasonableness of the defendant's underlying billing practice. *Id.* Likewise, in *Kellerman v. MCI Telecomms. Corp.*, 493 N.E.2d 1045, 1051-52 (Ill.), *cert. denied*, 479 U.S. 949 (1986), the court ruled that an award of damages would not interfere with MCI's rates nor any other aspect of the FCA's regulatory scheme. *Id.* at 1051. Hence, the court rejected the premise that awarding damages was an act of rate regulation. The courts in *Bennett v. Alltel Mobile Comm. Of Alabama, Inc.*, Civil Action No. 96-D-232-N, slip op. at 9 (M.D. Ala. May 14, 1996) (Res. App. A-1) and *Moultan v. Alltel Mobile Comm. Of Alabama, Inc.*, CA No. 96-D-89-N, slip op. (M.D. Ala. Aug. 16, 1996) (Res. App. B-18) also rejected AT&T's argument and ruled that plaintiffs' claims for damages were immaterial to the issue of preemption: "The court finds that the relief sought in the form of a refund in the difference between the amounts

charged and the amount consumers allegedly though they were being charged . . . does not relate to the rates charged or services provided . . . ." *Bennett*, slip op at 6, Res. App. A-7. Finally, in *American Inmate Phone Sys., Inc. v. U.S. Sprint Comms. Co.*, 787 F. Supp. 852 (N.D. Ill. 1992), the court concluded that the request for breach of contract damages "neither conflicts with the provisions of the Communications Act nor interfere with the regulatory scheme of the Act." *Id.* at 856.

In short, AT&T's predicate is false: Legal damages are not rates, and courts can award damages without regulating rates or otherwise interfering with a federal regulatory regime. An award of damages against AT&T for deceiving customers will leave AT&T's rates untouched, i.e., it will not impose obligations on AT&T that are inconsistent with any prior decisions of this Court.[12]

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[12] AT&T asserts that the Washington Supreme Court holding "conflicts with decisions by other courts, which have concluded that similar claims for damages constitute state rate regulation" and cites to *Simons* and *Powers* to support this proposition. Pet. 22. However, this proposition is simply false. Not only did *Simons* and *Powers* not even address the issue of damages but *Powers* suggests that had the allegations in the complaint focused on "[d]efendant's alleged failure to disclose the 'teardown time' charge, [rather than] the legality or reasonableness of such charges" the claims would have been allowed to proceed. Pet. App. 69a.

B. The Washington Supreme Court Holding Is In Accord With Numerous Other Holdings that Damages Are Not *Per Se* Regulation

To further support its claim of conflict, AT&T cites to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), in conjunction with Black's Law Dictionary, to press upon this Court that "damage awards unquestionably *can* constitute a form of state rate regulation." Pet. 21 (emphasis original). Based on this, AT&T contends that the Washington Supreme Court opinion is in conflict with Supreme Court authority. Pet. 22. However, as set forth below, the Washington Supreme Court holding on this issue *is not adverse* to Supreme Court authority.

The *Garmon* Court stated that "[r]egardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purpose." *Id.* at 244. However, here, respondents are attempting to punish AT&T for engaging in a deceptive practice – something which is *not the subject of national regulation*. Hence, there is no fear of "frustration of the national purpose," because Section 322 explicitly allows States to enforce consumer protection laws. Hence, *Garmon* is distinguishable from the case before this Court. In fact, dispositive on this issue, and in accord with the Washington Supreme Court's finding, is *Silkwood v. Kerr-McGee Corp.*,

464 U.S. 238 (1984). Like AT&T, the petitioners in *Silkwood* were unable to point to any legislative history or anything in the regulation that indicates that damages for violation of state laws are prohibited. *See id.* at 255. And, although allowance of damages may cause tension, the Supreme Court noted that such tension does not equate to a wholesale bar of damage awards:

> It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it so does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Id. at 256. By including the "terms and conditions" clause in Section 332 and by not delineating how states were to deal with violations of laws in areas which Congress has preserved their right to regulate, Congress made clear that an award of damages here resulting from a violation of consumer protection laws does not equal impermissible rate regulation. As a result, there is no conflict and no "compelling reason" to grant review.

C. The Washington Supreme Court Opinion Follows The Proper Standards Governing Preemption

There is a strong presumption against preemption in areas of traditional state regulation. *See New York State Conf.*

of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995);[13] *see also Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992).[14] The area of consumer protection is that traditionally regulated by the State. It is for this reason that consumer protection laws are often listed as part of the "terms and conditions" that *are exempt from Section 332*. In light of the strong state interest in protecting the welfare of its citizens and in enforcing its state consumer protection laws, it is hard to believe that AT&T would question the standards applied by the Washington Supreme Court.

AT&T contends that "nowhere in its decision below does the court mention . . . the critical role played by the statutory language." Pet. 23. This statement is wholly false.

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[13] The Court in *Travelers* stated: "[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 654-55 (citations omitted)

[14] The *Cipollone* Court held that the federal law regulating cigarette warnings and labeling would not preempt state law claims based upon express warranty, intentional fraud and misrepresentation, or conspiracy. *Id.* at 530-31. The Court determined that whether federal law is preemptive depends upon Congress' intent. *Id.* at 516. *Accord*, *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (Federal Motor Vehicle Safety standards did not preempt state-law product-liability cases alleging defective design for failure to require anti-lock brakes on tractor-trailers).

The court below focused on the critical role of the "terms and conditions" language which preserves state law causes of action for deceptive advertising.[15] Based on this statutory language, the court determined that Congress did not intend to remove states entirely from the wireless telephone industry. Had Congress intended to completely preempt state law causes of action, it most assuredly would not have included a clause which *explicitly provides for state regulation.*

Additionally, if the intent was to preempt all state law causes of action, Congress would not have included a savings clause.[16] Indeed, the Supreme Court has consistently found that savings clauses are further support against preemption. *See e.g., American Airlines v. Wolens,* 513 U.S. 219, 232 (1995). In *Wolens*, the Court was presented with a claim for violation of the consumer protection act as well as a claim for breach of contract. American Airlines contended that the claims were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713, which prohibits state regulation of a price, route, or service offered by an air carrier. As stated by the Court, it was not "plausible that Congress meant to channel into federal courts the business of resolving, pursuant to

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[15] *See supra*, n.2.

[16] *See* 47 U.S.C. § 414 (1994) ("Nothing in this chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.").

judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or service." *Id.* In addition, "the conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's savings clause." *Id.* Hence, the ADA's preemption clause "read together with the FAA savings clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves" that an airline has acted negligently with respect to other areas. *See generally id.*

As the Washington Supreme Court found, the same holds true here. The FCA's preemption provision read together with the savings clause, stops states from imposing standards on "the entry of or rates charged by any commercial mobile service" but does not prohibit regulation of the "other terms and conditions of commercial mobile services" such as deceptive advertising. *See generally* Pet. App. 31a. This reasoning of the Washington Supreme Court is harmonious with Supreme Court precedent and numerous other courts which have addressed this issue. There is no conflict and, therefore, no reason to grant review.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

FILED
MAY 14 1996
CLERK
U. S. DISTRICT COURT
MIDDLE DIST. OF ALA.

ROBBYN VAN BENNETT, etc.,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
ALLTELL MOBILE	)	96-D-232-N
COMMUNICATIONS OF	)	
ALABAMA, INC.,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Before the court is the plaintiff's motion, filed February 28, 1996, to remand this action to the Circuit of Lowndes County, Alabama, whence it was removed. The defendant responded in opposition on March 19, 1996.

In the three-count complaint, the plaintiff avers that in connection with the billing for cellular phone service, defendant Alltel, through its agents and employees, misrepresented and failed to disclose its practice of charging for a full minute of cellular phone air time even if a subscriber

is connected for only a few seconds. The plaintiff also contends that Alltel has breached its contract with the plaintiff because Alltel's contract fails to notify the user of the phone service of its practice of rounding up the amount of air time used to the next full minute. Subsequently, the defendant removed this action, asserting federal-question jurisdiction pursuant. to 28 U.S.C. §§ 1331 and 1441.[1] The defendant contends that the plaintiff's claim for relief involves the application of the communications Act, 47 U.S.C. §§ 151 et seq., and the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), which amended the Communications Act to expressly preempt any action by a state to regulate the rates charged by cellular service providers. In essence, the defendant contends that while the plaintiff has not pleaded a violation of the Communications Act or the OBRA, these Acts still control in this action. The plaintiff asserts, however, that he is seeking relief only under state law, thus, precluding removal based upon federal-question jurisdiction.

Because removal jurisdiction raises significant

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[1]Section 1441 states in part that ". . . any civil action brought in a State court of which district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . ." 28 U.S.C. § 1441(a). Pursuant to 28 U.S.C. § 1331, a district court has original jurisdiction over all cases "arising under the Constitution, laws or treaties of the United States."

federalism concerns, the removal statutes must be strictly construed. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). All doubts must be resolved in favor of a remand to state court. Stone v. Williams, 792 F. Supp. 749 (M.D. Ala. 1992); Lambert v. Mail Handlers Benefit Plan, 886 F. Supp. 830, 833 (M.D. Ala. 1995) (Albritton, J.) (remand of a removed case is favored where federal jurisdiction is not absolutely clear) (citing Burns v. Windsor Ins. 31 F.3d 1092, 1095 (11th Cir. 1994)); see also Horn v. Rural Community Insurance Servs., 903 F. Supp. 1502, 1504 (M.D. Ala. 1995) (Albritton, J.); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). Moreover, "the existence of a federal question cannot be left to mere speculation." Bryant v. Blue Cross & Blue Shield of Alabama, 751 F. Supp. 968, 969 (N.D. Ala. 1990) (citations omitted). As such, the defendant, as the party removing this action to federal court, has the burden of establishing federal jurisdiction. Sullivan v. First Affiliated Secs., 813 F.2d 1368 (9th Cir.), cert. denied, 484 U.S. 850 (1987).

The foregoing is consistent with the basic principle that federal courts are courts of limited jurisdiction and have the power to hear only those cases which congress or the Constitution authorizes them to hear. Lambert, 886 F. Supp. at 832 (citations omitted); Horn, 903 F. Supp. at 1504 (citing Gulf Offshore, 453 U.S. at 477-78). Accordingly, "a presumption (exists) that state courts have concurrent jurisdiction over claims that involve federal law." Id.

Whether the complaint states a federal question must be determined by examining the face of the complaint. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-11 (1983). As stated by the Supreme Court of the United States:

> [o]nly state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. See Gully v. First National Bank, 299 U.S. 109, 112-13 . . . (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (internal footnotes omitted); Great Northern R.R. Co. v. Alexander 246 U.S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his [or her] complaint determine the status with respect to the removability of a case."); The Fair v. Kohler Die & Specialty Co. 228 U.S. 22, 25 (1913) (The

plaintiff is "master to decide what law he [or she] will rely upon."); Burke v. Humana Ins.. Co., No. 95-T-299-N, No. 95-T-300-N, slip op. at 4 (M.D. Ala. May 11, 1995) (A plaintiff "has the prerogative to rely on state law alone although both state and federal law may give him (or her] a cause of action."). In other words, "lower federal courts [have] jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd., 463 U.S. at 27-28. The Supreme Court has narrowly construed the test to restrict removal by holding that simply because a claim implicates a federal issue, or involves construction of federal law does not necessarily give rise to a federal question and confer removal jurisdiction on a federal court. Merrill Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

Here, the original complaint neither mentions the Communications Act, as amended, nor invokes any other federal statute. Moreover, it does not mention a constitutional provision or a treaty. Hence, the complaint does not refer to any matter which allows access to a federal court under § 1331.

In making this determination, the court rejects the defendant's argument that the plaintiff's complaint necessarily implicates the filed rate doctrine which raises a federal

question. See Def.'s Opp. to Remand at 18-20. Specifically , the court finds that the defendant's reliance on T&G Express, Inc. v. Webster Indus., 93-D-1127-N, slip op. at 3 (Jan. 12, 1994) (DeMent, J.) (attach. as Ex. G), is misplaced. In T&G Express, this court did state that "[w]hen the tariff of a common carrier is challenged or recovery is predicated on the existence of a valid tariff, the case involves a federal question under 28 U.S.C. § 1331, which may be removed to federal court from a state court upon a filing of a notice of removal pursuant to § 1446 by the defendant." T&G Express, slip op. at 3. However, T&G Express is distinguishable from the instant case because the T&G Express plaintiff asserted a tariff claim, in addition to contract claims, which was the basis for removal. Thus, in T&G Express, the face of the complaint set forth a federal claim. The court interprets T&G Express as merely holding that when recovery is specifically predicated on the existence of a valid tariff as a specific count in the plaintiff's complaint, then the issue is one of federal law. In this case, on the other hand, the plaintiff predicates recovery solely on common law contract grounds. The tariff issue is raised as a defense by the defendant. Consequently, because the plaintiff is the master of his or her complaint, the court finds that T&G Express does not support the existence of removal jurisdiction in the instant case.

In addition, the court does not believe that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal law, in that federal law is a

necessary element of one of the well-pleaded claims. The court finds that the relief sought in the form of a refund in the difference between the amounts charged and amount consumers allegedly thought they were being charged does not confer the court with federal-question jurisdiction in that it does not relate to the rates charged or services provided, particularly when a commonsense reading of the complaint reflects the pleading of state law claims. The causes of action are, supported by alternative theories of state law, and the Communications Act, as amended, is not essential to any of those theories. The alternative theories of state law include breach of contract, fraud, misrepresentation, suppression of material facts, and engaging in deceptive practices. These are state law claims the determination of which must be left to the state court system. Moreover, retaining jurisdiction over this action would interfere with a state court's right to decide and interpret its own law as applied to the federal acts of this case. Accordingly, the court finds that the causes of action do not arise under federal law.[2]

The court recognizes that the preemptive force of some federal statutes can provide a legal basis for removal of a case from state to federal court even if a plaintiff has framed the complaint to allege violations of only state law.

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[2]The court notes that it is not persuaded by the defendant's "artful pleading" argument. Here, the plaintiff has not merely failed to plead federal questions, but rather, the substance of the plaintiff's complaint involves state law.

Metropolitan Life Ins.. Co. v. Taylor, 481 U. S. 58, 65 (1987). For example, the Supreme Court of the United States has determined that issues involving the Labor Management Relations Act, 29 U.S.C. § 1001, et seq., and the Employment Retirement Income Security Act, 29 U.S.C. § 185, et seq., transform state-law claims into ones arising under federal law for purposes of the well-pleaded complaint rule. Caterpillar, Inc., 482 U.S. at 393-94.

In determining whether complete preemption exists, the court focuses on congressional intent. Lambert, 886 F. Supp. at 836. The court is highly persuaded by Justice Brennan's concurrence in Metropolitan Life, wherein he stated: "In future cases involving other statutes, the prudent course for a federal court that does not find a clear congressional intent to create removal jurisdiction will be to remand the case to state court." Metropolitan Life, 481 U.S. at 68 (Brennan, J., concurring) (quoted in Lambert, 886 F. Supp. at 837). Thus, as stated in Horn v. Rural Community Ins.. Servs., 903 F. Supp. 1502 (M.D. Ala. 1995) (Albritton, J.), "[a]bsent a finding of clear Congressional intent to preempt the state courts from hearing the actions, the court must presume that complete preemption does not apply. Id. at 1504.

The defendant first relies on 47 U.S.C. § 332(c)(3)(A), as amended by OBRA, to support a finding of complete preemption under the Communications Act, as amended. Section 332 (c) (3) (A) states in pertinent part:

"Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rate charged by any commercial mobile service. . . ." 47 U.S.C. § 332(c)(3)(A). In comparison with the language of ERISA, the court finds that § 332(c)(3)(A) is not as broad in scope. See Lambert, 886 F. Supp. at 836 (similar finding involving the Federal Employees Health Benefits Act). As set forth above, the Communications Act, as amended, expressly provides for preemption only where state law regulates "the entry of or the rates charged by . . . commercial mobile service" providers, such as Alltel. 47 U.S.C. § 332(c) (3) (A). On the other hand, "ERISA's preemption clause states that the law 'shall supersede any and all state laws insofar as they may now or hereafter relate to an employee benefit plan.'" Lambert, 886 F. Supp. at 836 (discussing ERISA's jurisdictional and preemption clause) (emphasis added).

Clearly, Congress could have completely preempted state law by stating that § 332 (c) (3) (A) would preempt any state law that related to the rates charged by commercial mobile service providers, if it so desired. However, Congress chose to only prohibit the regulation of those rates by the states. In fact, § 332 (c) (3) (A) does not seek to vindicate the same interests upon which the plaintiff's state cause of action seeks relief. See Bryant, 751 F. Supp. at 972 (citing Allstate Ins.. v. 65 Security Plan, 879 F.2d 90, 93 (3d Cir. 1989)) (stating requirement for complete preemption includes

vindication of same interests). Here, the plaintiff is not contesting the rate charged, but rather is challenging Alltel's failure to disclose in its contract with consumers its practice of "rounding up" charges for air time. Hence, this action will not affect the rates charged; instead, it may, depending on the outcome, affect the disclosure of the rates charged. In other words, there is not a federal remedy directed to the matter of disclosing the basis behind the rate charged. Given that jurisdiction is not directly conferred by a cause of action concerning cellular services, the court finds that the preemptive force in § 332 (c) (3) (A) is not so powerful as to displace entirely any state cause of action within the ambit of the federal cause of action.

The defendant also points the court to §§ 47 U.S.C. 201(b) and 207 to suggest that the complete preemption doctrine applies to the Communications Act, as amended, thereby rendering any claim federal in nature.[3] Section 201(b) provides that any "charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful. . . ." 47 U.S.C. § 201(b). Section 207 vests exclusive jurisdiction over claims arising under § 201(b) in either the federal courts or the Federal Communications Commission:

> Any person claiming to be damaged by any common carrier subject to the provisions of

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[3]OBRA did not amend either § 201(b) or § 207.

> this chapter may either make complaint to the Commission . . . or may bring suit for the recovery of the damages in any district court of the United States. . . .

47 U.S.C. § 207.

In In re Long Distance Telecommunications Litigation, 831 F.2d 627 (6th Cir. 1987), the Sixth Circuit remanded a case similar to the instant case. Therein, the plaintiffs' fraud claims were based on the defendants' failure to disclose their practice of charging long distance customers for uncompleted calls, ring time and holding time. The Sixth Circuit held that the plaintiffs' state law claims for fraud and deceit, based on the defendants' alleged failure to notify customers of the practice of charging for uncompleted calls, were not preempted:

> We believe the district court erred in holding that the state law claims for fraud and deceit, based on the defendants' failure to notify customers of the practice of charging for uncompleted calls, were pre-empted by the Communications Act. These claims, unlike those based on Section 201 of the Act, do not require agency expertise for their treatment and are "within the conventional experience of judges."

831 F.2d at 633-34 (citing Far East Conference v. United States, 342 U.S. 570, 574 (1952)) (emphasis added).

In In re Long Distance Telecommunication ions Litigation, the court also distinguished Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968), relied on by the defendant in this case. The Sixth Circuit distinguished Ivy Broadcasting as follows:

> [In Ivy Broadcasting,]. . . the complaint charged negligence and breach of contract in the rendition of interstate telephone service. The Ivy court held that the claims were preempted by federal common law even though they did not charge violations of specific provisions of the Communications Act. However, the alleged torts involved the level of service provided by the defendants, not a failure to notify customers of a practice [as in this case].

Id, at 634. The court finds, contrary to the defendant's assertion and consistent with the court's discussion of § 332(c) (3) (A), that § 332 (c) (3) (A) does not alter the analysis or holding in Ivy Broadcasting. Moreover, as discussed supra, the court finds, similar to the Ivy Broadcasting court, that a commonsense reading of the complaint in this case suggests that the state law claims relate to the failure to disclose rather than rates or service.

More importantly, though, §§ 201(b) and 207 must be read in conjunction with the savings clause in § 414, which

states in pertinent part:

> [n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414 (emphasis added). The court finds that it logically follows from this savings clause that the Communications Act, as amended, did not preempt the entire field of commercial mobile services. See Hudson Ins.. Company v. American Electric Corp., 748 F. Supp. 837, 844 (M.D. Fla. 1990) (similar finding concerning the comprehensive Environmental Response Compensation and Liability Act of 1980), aff'd, 957 F.2d 826, cert. denied, 506 U.S. 955 (1992). In other words, the court finds that the savings clause indicates a lack of intent by Congress to extend the Communications Act, as amended, to all matters somehow related to those known to be preempted. Based on the foregoing, the court concludes that nothing in the Communications Act, as amended, gives the explicit suggestion necessary to infer that Congress intended to rely on a body of federal common law to interpret all actions involving commercial mobile services.[4] Cf. Hudson Ins.. Co.

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[4]In making this determination, the court rejects the defendant's argument that Sprint Corp. v. Evans, 818 F. Supp. 1447 (M.D. Ala. 1993) (Albritton, J.) lends support to the proposition that the Communications Act completely preempts the entire field

v. American Electric Corp., 748 F. Supp. 837, 843 n.5 (M.D. Fla. 1990) (reaching same conclusion regarding the Comprehensive Environmental Response Compensation and Liability Act of 1980); National Audubon Soc. v. Department of Water, 869 F.2d 11964 1201-03 (9th Cir. 1988) (reaching same conclusion regarding Clean Water Act).

If the court were to find otherwise, it would be allowing federal common law to implement precisely that which Congress determined was not necessary. Moreover, this case does not involve unique federal interests; rather, allowing a state court to hear this contract and fraud dispute between private parties will not frustrate federal policy. In fact, given that Congress enacted the savings clause, it obviously thought state courts could adequately handle matters in this area. As such, the court emphasizes that it "will not broaden the language of [any federal] statute without some clear indication from Congress that this was [its] intent." Horn, 903 F. Supp. at 1505 (citing Hyzer v. Cigna Property & Cas. Ins., Co., 884 F. Supp. 1146, 1151 (E.D. Mich. 1995)).

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of mobile commercial services. The court reads Sprint as completely preempting the field of interstate message transmissions. Here, though, the plaintiff is not attempting to regulate interstate message transmissions; rather, he is merely questioning a mobile service provider's disclosure policy to consumers. While the causes of action in this case may very well be preempted by a federal statute, the whole field is not preempted to constitute complete preemption.

The court finds that absent "complete preemption" of state causes of action, the defendant cannot establish that a federal court has original jurisdiction by arguing preemption as a defense:

> Ordinarily, federal pre-emption is raised as a defense to the allegations in a plaintiff's complaint. Before 1887, a federal defense such as pre-emption could provide a basis for removal, but, in that year, Congress amended the removal statute. We interpret that amendment to authorize removal only where original federal jurisdiction exists. Thus, it is now settled law that a case may not be removed to federal court on the basis, of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar Inc., 482 U.S. at 393-94 (internal citations omitted) (emphasis in original). The court notes that its ruling on "complete preemption has no preclusive effect on the state court's consideration of the substantive preemption defense." Bryant, 751 F. Supp. at 973 (quoting Whiteman v. Raley's, Inc. 886 F.2d 1177, 1180-81 (9th Cir. 1989)) (internal quotations omitted). In fact, the court has no jurisdiction to rule on the substantive preemption defense

because complete preemption is lacking. Id. "Th[e] court has no doubt that the Alabama state courts are perfectly capable of correctly applying the preemption defense. . . . Horn, 903 F. Supp. at 1506.

CONCLUSION

Because the plaintiff's complaint only involves state law claims and does not involve a substantial question of federal law, because the complete preemption doctrine does not convert the plaintiffs' state claims into claims under the Communications Act, as amended, and because a defendant may not remove a case based upon a federal preemption defense, the court finds that the defendants have failed to establish that at the complaint pleads a federal question. Thus, the court does not have original jurisdiction over this action.

Accordingly, it is CONSIDERED and ORDERED that the plaintiff's motion to remand be and the same is hereby GRANTED and this cause be and the same is hereby REMANDED to the Circuit Court of Lowndes County, Alabama. The clerk is DIRECTED to take all steps necessary to effect said remand.

DONE this */s/ 14th* day of May, 1996.

/s/ Jan DeMent

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
AUG 16 1996
CLERK
U.S. DISTRICT COURT
MIDDLE DIST OF ALABAMA

ROBERT MOULTON, III	)	
on behalf himself and all	)	
others similarly situated	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
ALLTELL MOBILE	)	96-D-89-N
COMMUNICATIONS OF	)	
ALABAMA, INC.,	)	
Defendant.	)	

ORDER

Before the court is defendant's request for a ruling on the plaintiff's motion to remand filed August 12, 1996, which the court construes as to include a motion to reconsider the decision of the clerk to close this case based on the plaintiff's notice of dismissal filed on June 20, 1996. For good cause shown, it is CONSIDERED and ORDERED:

(1) That the defendant's motion for reconsideration be and the same is hereby GRANTED because pursuant to Rule

23 (e) of the *Federal Rules of Civil Procedure* a plaintiff must obtain the court's approval of a dismissal of any potential class action as well as provide notice to all class members of such a dismissal.

(2) That this action be and the same is hereby REINSTATED.

(3) That pursuant to the authority of Robbyn Van Bennett, et al. v. Alltel Mobile Communications of Alabama, Inc., Civil Action No. 96-D-232-N (M.D. Ala. May 14, 1996) (DeMent, J.) (A copy of the order is attached hereto.) and 28 U.S.C. §1447(c), the plaintiff's motion to remand be and the same is hereby GRANTED and that this cause be and the same is hereby REMANDED to the Circuit Court of Montgomery County, Alabama. The clerk is DIRECTED to take all steps necessary to effectuate paid remand.

DONE this */s/ 16th* day of August, 1996.

/s/ Jan DeMent

UNITED STATES DISTRICT JUDGE

APPENDIX C

SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR KING COUNTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL LAIR and DAVE MANWEILER, individually and on behalf of all others similarly situated, Plaintiffs, vs. U.S. WEST NEW VECTOR GROUP d/b/a U. S. WEST CELLULAR Defendant.	NO. 95-2-26309-7-SEA

This Notice May Affect Your Rights.
Please Read It Carefully.

TO: ALL SUBSCRIBERS OF U. S. WEST NEWVECTOR WHO PARTICIPATED ON A PAYING BASIS IN A FULL-MINUTE CELLULAR CALLING PLAN AT ANY TIME DURING THE PERIOD JULY 1, 1994 THROUGH MAY 1, 1996, EXCEPT FOR (A) SUBSCRIBERS WITH TALKALONG℠ CALLING PLANS OR CALLING PLANS OFFERED TO CALIFORNIA SUBSCRIBERS, OR (B) SUBSCRIBERS WHOSE

ACCOUNTS WERE TERMINATED BY NEWVECTOR FOR NON-PAYMENT

INTRODUCTION

1. This Notice is given pursuant to an order of the Superior Court of Washington for King County. The purpose of this Notice is to inform you of the pendency of a class action and the proposed settlement of a class action that is pending on your behalf against U.S. WEST NewVector Group d/b/a U.S. West Cellular ("NewVector"), and to inform you how this lawsuit and the settlement may affect your rights and what steps you may take in relation to it. This Notice is not an expression of any opinion by the Court as to the merits of the claims or defenses by any of the parties to this class action.

DESCRIPTION OF THE CASE

2. Michael Lair and Dave Manweiler are the persons bringing this lawsuit (the "Plaintiffs"). Plaintiffs' claim relates to NewVector's method of billing cellular air time. For certain subscribers, NewVector rounds air time for billing purposes, to the next highest minute. This is also called "rounding up" or full-minute billing. For example, a call that lasts one minute and five seconds is rounded up to two minutes for billing and air time calculation purposes. This case is about whether this method of billing was adequately disclosed and was otherwise appropriate.

PLAINTIFFS' CONTENTIONS

3. The complaint alleges that NewVector offers customers a range of billing plans in each of its service areas. These plans offer a fixed-charge per month for a specified period of air time, (*e.g.*, thirty, sixty, seventy-five or two hundred minutes). For any air time beyond the fixed-charge time allotted under each plan, the subscriber is charged at various rates "per minute," depending on the plan and whether the call is made during peak or off-peak hours.

4. Plaintiffs allege that the plain import of the language describing these plans is that a customer receives a set amount of air time.

5. Once a customer has selected the billing plan, NewVector requires that each customer sign a Service Agreement which identifies the plan selected. Plaintiffs contend that these Service Agreements contain all of the terms and conditions of the customers' agreement with NewVector. Plaintiffs contend that missing from the billing terms is the fact that NewVector rounds up air time to the next highest full minute.

6. Plaintiffs contend that NewVector's "rounding" practice is not fully disclosed or referenced in NewVector's point of sale documents, *i.e.*, brochures and rate plans.

7. Plaintiffs contend that rounding up air time damages Settlement Class Members by preventing customers from receiving the specified fixed-charge air time under their

plans. For example, if a plan provides thirty minutes of air time, a customer may actually be on the air for less than thirty minutes but might begin paying on a per-minute basis due to rounding up.

8. In their complaint Plaintiffs allege that NewVector's method of billing constitutes a violation of the Washington State Consumer Protection Act (and/or other consumer protection statutes in other states), negligent misrepresentation, common law fraud and a breach of contract. Plaintiffs seek monetary damages for the injury caused to class members, treble damages under the Washington Consumer Protection Act, and costs of the suit including attorneys' fees.

DEFENDANT'S CONTENTIONS

9. NewVector denies all allegations of wrongdoing and liability. As explained more fully herein, NewVector contends that full-minute billing was fully disclosed in NewVector's advertising brochures, bills, service agreements and by information available to consumers in the marketplace and was legally permissible and appropriate. NewVector also contends that its advertising and sale of cellular service were not the cause of damages to consumers, since NewVector changed its billing plans in response to consumer feedback and lowered rates to provide additional savings to subscribers. Further, even if subscribers were

unaware of NewVector's advertising brochures and the standard industry method of full-minute billing, the method of billing would have been fully disclosed by the first bill, representing one of numerous ways in which potential damages would be limited.

CLASS CERTIFICATION

10. For the purposes of Settlement, NewVector has stipulated to a Settlement Class. A "class" is a legal mechanism whereby one or more individuals can represent all those who are similarly situated with respect to defendant's alleged conduct.

11. The Settlement Class consists of the following members: All subscribers of U. S. WEST NewVector who participated on a paying basis in a full-minute cellular calling plan at any time during the period July 1, 1994 through May 1, 1996 (the "Settlement Class Period"), except for (a) subscribers with TalkAlong℠ calling plans or calling plans offered to California subscribers, or (b) subscribers whose accounts were terminated by NewVector for non-payment (an "involuntary deactivation").

Your receipt of this notice, therefore, does not necessarily mean that you are a class member. You are a class member only if you fit within the class definition set out above.

TERMS OF THE SETTLEMENT

12. Class Counsel have thoroughly investigated the facts and applicable law regarding the claims of the persons on whose behalf they are acting and potential defenses thereto. Based on this, Plaintiffs and Class Counsel believe that the proposed settlement set forth below is fair, reasonable and adequate, and in the best interests of the Settlement Class. Class Counsel also conducted extensive negotiations with counsel for NewVector prior to arriving at this settlement, taking into account the relevant facts and law. The following description of the proposed settlement is only a summary, and reference is made to the text of the Stipulation of Settlement, on file with the Court, for a full statement of its provisions:

(a) NewVector will fully and fairly disclose "rounding up" or full-minute billing in contracts, service agreements and all point-of-sale collateral documents, when it is occurring.

(b) NewVector acknowledges that in response to this litigation, it has already changed some or all of its disclosures regarding full-minute billing.

(c) NewVector will compensate members of the Settlement Class according to i) a member's average monthly cellular usage during the Settlement Class Period (measured in terms of minutes of usage or "MOUs") and ii) whether the member is an active NewVector subscriber, or

whether the member's cellular service was terminated voluntarily by the member, or involuntarily by NewVector:

SETTLEMENT AWARDS

Customer Usage	**Groupings**
Highest	>250 MOU/Month
High	150-250 MOU/Month
Medium	60-150 MOU/Month
Low	<60 MOU/Month

Settlement Awards -- ACTIVE SUBSCRIBERS (*i.e.*, current customers)

Bill Credit (Highest Usage)	$26
Bill Credit (High Usage)	$18
Bill Credit (Medium Usage)	$ 9
Bill Credit (Low Usage)	$ 3

Settlement Awards -- VOLUNTARY DEACTIVATION (meaning you elected to terminate your services, *i.e.*, you are a former customer).

Bill Credit or cash (Highest Usage)	$26
Bill Credit or cash (High Usage)	$18
Bill Credit or cash (Medium Usage)	$ 9
Bill Credit or cash (Low Usage)	$ 3

(d) Former subscribers whose cellular

service was terminated by NewVector for nonpayment (i.e., involuntary deactivations) are not included within the Settlement Class.

(e) Each Settlement Class Member is entitled only to one settlement award. The average monthly cellular usage and resulting settlement award for Settlement Class Members with more than one qualifying cellular line of service will be calculated using an average of the applicable MOUs for all qualifying lines of service. Active Settlement Class Members who also have one or more separate voluntarily deactivated lines of service will receive their settlement award as an Active Subscriber. Settlement Class Members with more than one voluntarily deactivated line of service, and no active line of service, will be eligible to reactivate one cellular line of service.

(f) The value of the consideration set forth above is estimated to be approximately $8.4 million. NewVector's total obligation may vary with the final accounting, but the value for each class member remains the same.

(g) NewVector will pay all notice and administration costs, including but not limited to the costs of printed and published notice, publication of summary notice, identification of class members, and calculation and payment of claims.

(h) If a Settlement Class Member within the voluntary deactivation category reactivates with

NewVector and elects the bill credit option, that class member i) has the right to waiver of the activation fee, and ii) can opt for a month-to-month contract if reactivation is with his or her own phone. If NewVector supplies the cellular phone, then a standard twelve-month service agreement is required.

(i) In exchange, if the Settlement is approved, the Court will enter a final judgment dismissing this action with prejudice, and dismissing with prejudice all claims, demands, and causes of action against NewVector, its subsidiaries, affiliates, agents, predecessors, successors and assigns, as their respective representatives, that were or could have been asserted by Plaintiffs and the Settlement Class Members who do not elect to exclude themselves from the class and its benefits arising out of the facts and circumstances alleged in this action. If the proposed settlement is approved, all members of the Settlement Class who do not elect to exclude themselves from the class and its benefits will be personally barred and enjoined from instituting or prosecuting, indirectly or directly any and all actions or proceedings that they had or have, known or unknown, arising out of or based upon the facts set forth in the Complaint. All members of the Settlement Class who do not elect to exclude themselves from the class, whether or not they file a claim form, will be bound by the terms of the settlement and releases of claims and any order of the Court dismissing the litigation

16. Plaintiffs took into account all of the foregoing

factors in agreeing to the proposed settlement. Although Plaintiffs believe they would have overcome these defenses, there is no certainty that this, in fact, would occur.

HOW CLAIMS WILL BE PROCESSED

17. Accompanying this Notice is a Proof of Claim and Release ("Proof of Claim") which must be filled out in order to take part in the settlement. Settlement Class Members must indicate a) whether they are active or former subscribers as of the date they mail the Proof of Claim, and b) if they are former subscribers, whether they elect to reactivate or receive a cash award. The Proof of Claim must be mailed on or before October 20, 1997 to: NewVector Claims Administration, P.O. Box 4068; Portland, OR 97208-4068. All claims will be administered within 120 days of the final approval of the Settlement by the Court.

ELECTION BY CLASS MEMBERS

18. If you are a member of the class, you have a right to elect whether or not to exercise your right to exclude yourself from the class. Your choice will have certain consequences that you should understand before making this decision.

IF YOU WISH TO REMAIN IN THE CLASS, YOU

NEED NOT RESPOND TO THIS NOTICE IN ORDER TO DO SO BUT YOU SHOULD FILL OUT A CLAIM FORM.

IF YOU DO NOT WISH TO REMAIN IN THE CLASS, YOU MUST RESPOND TO THIS NOTICE.

CONSEQUENCES OF EXCLUSION FROM THE CLASS

19. If you do not wish to remain a member of the class, you must request to be excluded. If you request exclusion, you will not be entitled to share in the settlement. However, if excluded, you may present any claims you have against NewVector by filing your own lawsuit.

20. If you do not wish to remain a member of the class, you must mail a written request for exclusion, postmarked no later than August 18, 1997, to: Steve W. Berman, Hagens & Berman, 1301 Fifth Avenue, Suite 2929, Seattle, WA 98101 and Barry Kaplan, Perkins Coie, 1201 Third Avenue, 40th Floor, Seattle, WA 98101.

21. Requests for exclusion must refer to Lair v. U.S. West NewVector, No. 95-2-26309-7 SEA and must provide your name and address. For the sake of convenience, please also provide your current or former NewVector cellular account numbers. All requests for exclusion must be signed

and expressly state that you wish exclusion from the class.

THE HEARING

22. A hearing (the "Settlement Hearing") will be held before the Honorable R. Joseph Wesley at 8:30 a.m. on August 25, 1997, in Room W905 of the Superior Court of the State of Washington for King County, at 516 Third Avenue, Seattle, WA, for the purpose of determining whether the proposed Settlement is fair, reasonable and adequate and whether it should be approved by the Court; whether judgment should be entered dismissing the actions on the merits and with prejudice as against Defendant. The Settlement Hearing may be continued or adjourned from time to time by the Court at the Settlement Hearing or any continued or adjourned session thereof without further notice.

23. Settlement Class Counsel will apply to the Court at the conclusion of the Settlement Hearing for an award of attomeys' fees and costs of $1,686,000, which represents approximately 20% of the monetary value of the Settlement. This amount will be paid by NewVector in addition to the previously described amounts being offered to the Settlement Class. Plaintiffs will also seek approval of payments to the two plaintiffs of $10,000 each, as payment for the time and expense in prosecuting this case on behalf of the Settlement Class.

24. Any member of the Settlement Class who has not requested exclusion may appear at the Settlement Hearing to show cause why the proposed Settlement should not be approved, the Class Action should not be dismissed on the merits with prejudice as against the Defendant, and to present any opposition to the application of Settlement Class Counsel for attorneys' fees, costs and expenses, or to the application for an award to the plaintiffs, provided, however, that no such person shall be heard, unless his or her objection or opposition is made in writing and is filed, together with copies of all other papers and briefs to be submitted by him or her to the Court at the Settlement Hearing, with the Court no later than ten days prior to the hearing, and showing due proof of service on:

Settlement Class Counsel:

Steve W. Berman
Hagens & Berman
1301 Fifth Avenue, Suite 2929
Seattle, WA 98101

and Counsel for Defendant:

Barry Kaplan
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, WA 98101-3099

Unless otherwise ordered by the Court, any member of the Settlement Class who does not make his or her objection or

opposition in the manner provided shall be deemed to have waived all objections and opposition to the fairness, reasonableness and adequacy of the proposed settlement, or to the request of Settlement Class Counsel for attorneys' fees, costs and expenses,

ADDITIONAL INFORMATION

25. This notice is not all-inclusive. Any questions you have concerning the matters contained in this notice (and any corrections or changes of name or address) should not be made to the Court but should be directed in writing to Settlement Class Counsel at the address listed below.

26. If you wish to communicate with Settlement Class Counsel as your attorney in this litigation, you may do so by writing to Steve W. Berman at the firm of Hagens & Berman, P.S., 1301 Fifth Avenue., Suite 2929, Seattle, WA 98101.

Please do not contact the court for further information at this time.

DATED: July 8,1997.